SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: Nationwide Insurance Co. v. Linda Wolos
C.A. No. 04A-10-001 RRC

Submitted: May 27, 2006
Decided: August 23, 2006

Upon Appeal from a Decision of the Industrial Accident Board.
AFFIRMED.

Dear Counsel:

Before this Court is an appeal filed by Employer Below/Appellant Nationwide Insurance Company ("Employer") from a decision rendered by the Industrial Accident Board ("Board") on September 8, 2004, in favor of Claimant Below/Appellee Linda Wolos ("Claimant"). That decision dismissed Employer's Petition for Termination of Benefits on the grounds that the petition was precluded under an Agreement as to Compensation, which defined Claimant's compensable injury and was previously executed

by the parties. The issue is whether the Board erred as a matter of law in deciding that Employer's petition for termination was precluded by the prior agreement between the parties. For the reasons set forth below, the decision of the Board is **AFFIRMED**.

I. FACTS AND PROCEDURAL HISTORY

During Claimant's employment as an insurance adjuster for Employer, she developed a work-related injury to her shoulder that required surgery in September of 2001.[1] After the surgery, Claimant was found to be suffering from an unrelated connective tissue disorder, later determined to be scleroderma, apparently an ultimately fatal disease, which rendered Claimant totally disabled and from which Claimant continues to be totally disabled.[2] After the surgery on the shoulder, Employer filed a Petition for Review on February 28, 2002,[3] arguing that Claimant's shoulder injury had resolved and that Claimant was able to go back to work. However, before the Board ruled on the petition, the parties entered into an Agreement as to Compensation, which was then approved by the Board.[4] Essentially, the agreement was for total disability benefits and reflected that both parties found that, in addition to the shoulder injury, the connective tissue disorder was a compensable injury.

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[1] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 1 (Sept. 8, 2004), Ex. E to Appellant's Appendix.

[2] *Id.* at 1-2. There appears to be some dispute between the parties as to when Claimant was first diagnosed with scerloderma. While Employer alleges that Claimant was diagnosed with the disease before the shoulder surgery, Claimant maintains that the diagnosis occurred after the surgery. As the Board determined that "[s]ubsequent to the surgery, Claimant was determined to be suffering from a connective tissue disorder," this Court holds that finding to be conclusive. *Id.* at 1. However, it does appear from the record that Claimant may have displayed symptoms of a connective tissue disorder prior to the shoulder surgery. *See Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 2 (June 17, 2004), Ex. G to Appellee's Appendix ("Following [shoulder] surgery Claimant exhibited symptoms that were ultimately diagnosed as a connective tissue disorder, an underlying condition that had been present before the surgery."). This distinction, in the end, makes little difference as Employer expressly agreed that the connective tissue disorder was compensable in the compensation agreement.

[3] Ex. B to Appellee's Appendix.

[4] The Board specifically found that the "Agreement, signed by the parties, was received in the Office of Workers' Compensation on June 1, 2004, and was approved by mid-July 2004. The actual signatures of the parties do not bear a date, so it is unknown when they were signed." *Wolos*, IAB No. 1206368, at 2 n.4 (Sept. 8, 2004).

On February 12, 2004, Employer filed a Petition to Review seeking to terminate Claimant's total disability benefits on the basis that "Claimant's pre-existing condition [i.e. the connective tissue disorder], having been first accelerated by the work-injury-related surgery, has now progressed to a level it would have achieved by this date in the natural course of the condition despite the acceleration."[5] Claimant then filed a motion to dismiss on the grounds that "the impetus for the Petition to Review is a change of the defense medical expert's opinion on causation … [which] is legally insufficient to sustain a petition to terminate."[6] However, the Board denied Claimant's motion to dismiss to allow Employer's medical experts to testify because the Board could not "say with certainty that there are no facts [Employer] could introduce to merit termination."[7]

Employer then filed a Petition to Terminate Benefits, which is the subject of this appeal, with the Board on the grounds that the Employer "did not accept responsibility for the connective tissue disorder, but only acknowledged that the [shoulder] surgery caused an 'acceleration' of the disorder."[8] Claimant moved to dismiss Employer's petition on the grounds that Employer "accepted the compensability of the entire connective disorder and not just a transient acceleration of that disorder."[9] Thus, the dispute, as the Board described it, "rest[ed] in the characterization of what [Employer] acknowledged as being the compensable injury.[10] Employer argued before the Board, in connection with Claimant's motion to dismiss Employer's petition to terminate benefits, that Claimant's then-condition was the same as it would have been had she not had the shoulder surgery; thus, "the effects of the compensable acceleration have 'terminated' even though Claimant's medical condition itself has not improved."[11] Claimant, on the other hand, and in support of her motion to dismiss the petition, relied upon the agreement previously executed by the parties, which showed that

[5] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 2 (June 17, 2004) (denying claimant's motion to dismiss employer's petition to review to give time to allow employer's medical expert to be deposed), Ex. G to Appellee's Appendix.

[6] *Id.* at 1.

[7] *Id.* at 7.

[8] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 2 (Sept. 8, 2004).

[9] *Id.*

[10] *Id.*

[11] *Id.*

Employer had accepted the entire connective tissue disorder as a compensable injury, not merely an "acceleration" of the disease.[12]

The Board, in rendering its decision on Claimant's Motion to Dismiss on September 8, 2004, framed the issue well:

> [W]hat is the "accepted disorder"[13] in this case? If the "accepted disorder" was only an aggravation of Claimant's connective tissue disorder, then [Employer] can legitimately proceed on its argument that the aggravation had ended. On the other hand, if the "accepted disorder" is the connective tissue disorder itself, then [Employer's] petition must fall because it has no evidence that that disorder has ended or that the disability from that disorder has ceased.[14]

Ultimately, the Board agreed with Claimant and found as a matter of law that "the Agreement is plain on its face … [and that] [Employer] accepted Claimant's entire connective tissue disorder as being compensable."[15] The Board found that "the 'accepted disorder' must be that specifically listed on the Agreement as to Compensation … [which] lists the nature of the injury as 'connective tissue disorder,' not just an aggravation thereof."[16] The Board also found that Employer "had the ability and opportunity on the Agreement to limit compensability to an aggravation of a pre-existing disorder and it did not."[17] The Board further recognized the "final and binding" nature of such an agreement once it is approved by the Board and that because "both parties are on notice as to the legal ramifications of the documents … the Board does not find it unreasonable to expect parties to complete such documents carefully … [and] to hold parties to the expressed [sic] terms of those agreements."[18] The Board also noted that although causation issues had been brought in previous, unrelated cases, in which the Board had expressed concerns as to causation, "those concerns were unavailing because the agreement of the parties was considered 'final and

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[12] *Id.*

[13] The term "accepted disorder" was initially used by the Board in *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368 (June 17, 2004), to describe the injuries that were recognized by both parties in the Agreement as to Compensation as causing Claimant's total disability.

[14] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 6 (Sept. 8, 2004).

[15] *Id.* at 7.

[16] *Id.* at 6.

[17] *Id.* at 7.

[18] *Id.*

binding.'"[19] Finally, as the Board found that Claimant remained totally disabled because of the connective tissue disorder (a compensable injury under the compensation agreement), and that Employer did not dispute that it could not prove that Claimant's entire disorder had terminated or diminished, the Board dismissed Employer's petition to terminate.[20]

II. CONTENTIONS OF THE PARTIES

Employer argues that the Board erred as a matter of law by focusing solely on the compensation agreement instead of considering whether Claimant's "present day disability is related to the pre-existing and progressive connective tissue disorder rather than the work related acceleration."[21] Essentially, Employer argues that because Claimant "had a pre-existing symptomatic connective tissue disorder that was not related to her work duties[,] … [which] was aggravated by the surgery performed to address her shoulder[,]" then Employer is responsible only for the acceleration of the underlying condition.[22] Employer also argues that "[a]t the time the injured worker's disability is no longer due to the acceleration, but to the underlying condition[,]" the liability of the Employer must cease.[23]

Moreover, Employer contends that the compensation agreement, which indicates that the compensable injury includes "connective tissue disorder," should not have controlled the Board's decision because the doctrine of collateral estoppel does not apply in this situation.[24] Employer asserts that the "issues presented are not identical to those in existence at the time the Agreement for Compensation was executed[,]" thus precluding the application of collateral estoppel to bar Employer's petition.[25] Employer maintains that at the time the agreement was executed the issue was "whether [Claimant] was then disabled due to the effects of the work accident," whereas here, the issue is "whether the effects of the work-related acceleration of her condition continue to be a factor in [Claimant's] present-

[19] *Id.*
[20] *Id.*
[21] Employer's Op. Br. 17.
[22] *Id.* at 10.
[23] *Id.*
[24] *Id.* at 13.
[25] *Id.*

day disability."[26] Employer alleges that the Board abrogated its statutory duty to modify the compensation agreement "by forcing the Employer to accept … all liability for any condition ever deemed or found to [be] a part of the work accident."[27] From a policy standpoint, Employer contends that the "Board essentially held that it will never consider whether an injured worker's disability continues to be the product of the work accident as to any condition listed on the agreement."[28]

In response, Claimant argues that the Board did not err in dismissing Employer's petition as it was barred by the compensation agreement that was executed by both parties and determined an issue already "voluntarily acknowledged by [Employer] and judicially accepted by the Board."[29] Claimant contends that "where an agreement, approved by the Board, has accepted 'an injury as work-related, the Board may 'not revisit this causation issue on employer's petition to terminate.''"[30] Claimant also argues that because the parties entered into an agreement as to compensation that specifically identified "connective tissue disorder" as a compensable injury, which was then approved by the Board, "the Board is precluded from considering the issue of causation."[31]

III. STANDARD OF REVIEW

The Delaware Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[32] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[33] The appellate court does not weigh the evidence, determine questions of credibility, or make its own

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[26] *Id.*

[27] *Id.* at 16.

[28] *Id.* at 11.

[29] Claimant's Ans. Br. 8.

[30] *Id.* at 9 (citations omitted).

[31] *Id.* at 11.

[32] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. Super. Ct. 1965).

[33] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. Ct. 1986), *appeal dismissed*, 515 A.2d 397 (1986).

factual findings.[34] The reviewing Court must view the facts in a light most favorable to the party prevailing below;[35] therefore, it merely determines if the evidence is legally adequate to support the agency's factual findings.[36] Findings of fact made by the Board will be upheld unless the record does not contain proof to support such factual findings.[37] Finally, as here, where the issue involves an alleged error of law on the part of the Board, this Court's review is *de novo*.[38]

IV. DISCUSSION

The instant issue is whether the Board erred as a matter of law by dismissing Employer's petition to terminate as being precluded by the executed compensation agreement. The answer to that question will depend on whether the injury that was the subject of the compensation agreement has "subsequently terminated, increased, diminished or recurred…"[39] As this is a matter of law, the Board's application of the relevant law will be reviewed *de novo*.

Delaware law provides a mechanism for parties engaged in workers' compensation litigation to reach an agreement as to compensation prior to and in lieu of an award given by the Board. 19 *Del. C.* § 2344(a) provides that "[i]f the employer and the injured employee … reach an agreement in regard to compensation … and if [it is] approved by [the Department of Labor], [it] shall be final and binding unless modified as provided in § 2347 of this title."[40] These agreements have been held to have preclusive effect by prohibiting a party from later asking the Board to review the correctness of the agreement as to causation.[41]

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[34] *Johnson*, 213 A.2d at 66.

[35] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

[36] 29 *Del. C.* § 10142(d).

[37] *Johnson*, 213 A.2d at 67.

[38] *Brooks v. Johnson*, 560 A.2d 1001, 1002 (Del. 1989) (citing *Nardo v. Nardo*, 209 A.2d 905 (Del. 1965)).

[39] 19 *Del. C.* § 2347(a).

[40] *See also* 8 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 132.06(2) (2004) ("If the settlement [as to compensation] is approved, it takes on the quality of an award, and the parties can no more back out of it than any other kind of award.").

[41] *Whalen v. State*, 1994 WL 636915 (Del. Super.) (holding that the Board erred as a matter of law by reviewing "*de nova*" issues relating to an injury that had been addressed in a prior agreement as to compensation and approved by the board). *See also*

As noted above, such an agreement as to compensation may be amended, in certain limited situations. The relevant statute for review and modification of an agreement is 19 *Del. C.* § 2347(a), which provides that "[o]n the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred … the Board may at any time … review any agreement or award."

However, a balance must be struck between the sanctity of the agreement entered into by the parties and the Board's potential statutory ability to modify such an agreement. The preclusive effect of an agreement to compensate does not apply "[w]here the Board is asked to reconsider the incapacity … of a claimant based on one of these specifically delineated changes in circumstances [found in § 2347(a).]"[42] Thus, where there is an alleged claim by an employer of a change in the incapacity of the claimant, the Board may revisit, among other potential issues, the problem of causation. However, the preclusive effect of a compensation agreement bars a future attack on the correctness of the prior agreement as to compensation, unless the agreement is in some other way void.[43] Thus, causation may not be reconsidered in that situation. The sole footnote in *Betts* is helpful for analysis here:

Elliot v. Salisbury Coca-Cola, 1996 WL 453340, * 4 (Del. Super.) (holding that a prior agreement had *res judicata* effect on the issue of causation in a subsequent petition as the "causation issue … is separate [any] § 2347 issues").

[42] *Betts v. Townsend*s, *Inc.*, 765 A.2d 531, 534 (Del. 2000) (affirming Superior Court's refusal to hold that Board's prior decision prevented Board from revisiting issue of causation because the issues in the respective board hearings were distinct). *See also Harris v. Chrysler Corp.*, 1988 WL 44783, * 1 (Del. Supr.) (holding that the law is clear that "the doctrine of *res judicata* is not a bar to the Board's exercise of its authority conferred by 19 *Del. C.* § 2347 to review, modify or terminate previous awards [or agreements] upon proof of subsequent change of condition").

[43] *Betts*, at 534 (citing *Taylor v. Hatzel & Buehler*, 258 A.2d 905, 908 (Del. 1969) ("[A]wards of compensation boards are generally held to be *res judicata* and, thus, immune from collateral attack, except where the award for some reason is void.")). *See also* 82 Am.Jur.2d *Workers' Compensation* § 512 (2003) ("A settlement of a compensation claim which has been approved … operates as an adjudication of the facts agreed upon in the settlement, … has the same force and effect as an award made after a full hearing, and thus the matter may not be later reopened absent … a change in the employee's physical condition … and is res judicata as to the employer's obligation to pay compensation.").

> [S]uppose the Board found that a claimant was involved in an industrial accident that caused permanent partial disability. Subsequently, the employer seeks to terminate benefits on the basis that the claimant is no longer permanently disabled. In that case, *res judicata* would prevent the Board from revisiting the issue of causation. Under § 2347, however, the Board would be free to reconsider whether the claimant remained permanently partially disabled because it has statutory authority to determine if the incapacity of the employee has subsequently terminated.[44]

Such an example is closely on point with the case at bar. Here, the parties executed a compensation agreement that, as the Board found, specifically included "connective tissue disorder" in the nature of the accepted injury. Now, Employer seeks to modify the agreement and terminate benefits on the grounds that the "acceleration" of the disease attributable to the shoulder surgery has ended, even though the connective tissue disorder itself has not terminated.

However, to invoke the modification powers of the Board in § 2347, Employer must show, among other things, that the compensable injury recognized in the agreement has terminated, or otherwise changed. The Board found that Employer "accepted the compensability of Claimant's entire connective tissue disorder[,]" because that disease was expressly listed in the executed compensation agreement.[45] The Board also found that Employer "does not dispute that it currently has no evidence to prove" that Claimant's incapacity has either terminated or decreased.[46] There is no argument from either party that these findings are incorrect or not supported by substantial evidence. Thus, they are binding on this Court.

Employer's reliance on two cases from this Court, *Atkinson v. Delaware Curative Workshop*[47] and *Floyd v. Atlantic Aviation*,[48] to demonstrate that the prior agreement does not preclude Employer's Petition

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[44] *Id.* at 534 n.*.

[45] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 7 (Sept. 8, 2004).

[46] *Id.*

[47] 2001 WL 38787 (Del. Super.) (holding that collateral estoppel did not bar review of a prior award of the Board where the issues presented at each respective hearing were not identical as claimant's incapacity had increased since the time of the prior award).

[48] 1999 WL 33217938 (Del. Super.) (holding that the Board could review a prior award where certain "intervening factors" had caused a change in the circumstances of claimant's incapacity).

to Terminate Benefits is misplaced. Employer relies on *Atkinson* for the proposition that "because the Board always has the statutory authority to review any agreement or award, 'the doctrine of collateral estoppel does not apply.'"[49] However, such an expansive reading of § 2347 and *Atkinson* is not warranted. The statute limits the Board's ability to review and modify an agreement to a set of "specifically delineated changes in circumstances" where the incapacity of the claimant has "subsequently terminated, increased, diminished or recurred…" Thus, to say that the Board "always" has the ability, under the statute, to review an agreement overstates the authority of the Board. Moreover, *Atkinson* recognized that the claimant's incapacity had "increased or recurred," thus, giving the Board the ability, under those specific facts, to review and modify the prior award given by the Board.[50] In this case, unlike in *Atkinson*, the Board found that there was no dispute that Claimant's condition, as it relates to the entire connective tissue disorder, had changed. Therefore, *Atkinson* is inapposite to the case at bar.

Likewise, *Floyd* is distinguishable from the instant case based on the facts. Employer relies on *Floyd* for the theory that the Board may review the causation issue if the employer could show the presence of intervening factors that were the source of the claimant's present condition.[51] However, the *Floyd* court only allowed such a modification to occur if the incapacity recognized in the prior award given by the Board had changed.[52] This is consistent with the plain language of § 2347, which requires a change in the claimant's incapacity to trigger the Board's power to modify. The *Floyd* court recognized such a change in incapacity and thus, allowed the Board's decision that modified the initial award to stand.[53] Therefore, as here, unlike *Floyd*, there is no evidence to indicate that Claimant's accepted incapacity has changed. *Floyd* is inapplicable to the facts before this Court.

Based on the findings of the Board, the issue is whether the Board erred in dismissing Employer's petition based on the preclusive effect of the compensation agreement. The holding of *Betts* and the plain language of § 2347, contrary to the suggestion of Employer, will only allow the Board to review a prior agreement if the incapacity is "subsequently terminated, increased, diminished or recurred…" There has been no such showing here.

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[49] Employer's Op. Br. 12 (citing *Atkinson*, at * 3-4 (citing 19 *Del. C.* § 2347)).
[50] 2001 WL 38787, at * 3.
[51] Employer's Op. Br. 14-15.
[52] 1999 WL 33217938, at * 3.
[53] *Id.*

Although the Employer argued before the Board that the acceleration of the disorder that resulted from the surgery has terminated (and Employer may be correct), "aggravation" or the "accelerative effect[]"[54] of the connective tissue disorder is not recognized as the compensable injury in the compensation agreement; instead, as shown by the plain language of the agreement, the compensable injury is the entire disorder. The agreement has the same integrity as a decision of the Board itself and the Employer cannot now "back out of it,"[55] especially in light of the fact that there is no dispute that the circumstances of Claimant's incapacity have not changed. As the Board noted, Employer had the ability and opportunity on the [Board-approved Compensation] Agreement to limit compensability to an aggravation of a pre-existing disorder and it did not."[56] Thus, the Board did not err in dismissing Employer's petition based on the preclusive effect of the agreement as to compensation.

V. CONCLUSION

Based on the foregoing, the decision of the Industrial Accident Board is **AFFIRMED.**

Very truly yours,

oc: Prothonotary
cc: Industrial Accident Board

[54] *See* Employer's Op. Br. at 10, 17.
[55] *See* Larson's, at § 132.06(2).
[56] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 7 (Sept. 8, 2004).